

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION

In re Application of) MM Docket No. 94-71
)
SANTA MONICA COMMUNITY COLLEGE) File No. BPED-920305ME
DISTRICT)
)
For a Construction Permit for a)
New Noncommercial FM Station on)
Channel 201B at Mojave, California)

To: The Commission

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MOTION FOR LEAVE TO SUPPLEMENT RECORD

Santa Monica Community College District ("SMCCD") hereby moves for leave to supplement the record in the above-referenced docket to bring to the Commission's attention a recent Memorandum Opinion and Order which has a bearing on the issues certified to the Commission by the Presiding Judge. In support of the instant motion, the following is stated:

1. On July 28, 1995, the Commission released the Presiding Judge's Memorandum Opinion and Order certifying to the Commission the question whether SMCCD's pending application should be granted. Santa Monica Community College District, FCC 95M-174 (ALJ July 28, 1995). That question, in turn, revolves around the issue whether SMCCD should be able to retain its protected cut-off status in hearing after amending its application to specify a new channel (in conjunction with SMCCD's Settlement Agreement with Living Way Ministries, whose mutually exclusive application had been designated for hearing with SMCCD's application).

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2. On June 27, 1995, the Commission released its Memorandum Opinion and Order in Citadel Communications, Ltd., FCC 95-264 (June 27, 1995). A copy of the decision is annexed hereto.

3. Citadel Communications, Ltd. involved a proposal by a television licensee ("Citadel") to change its community of license from Albion to Lincoln, Nebraska. The proposal was conditioned on the allocation of a new television channel (Channel 18) to Albion, the modification of the Citadel's FCC license to specify Lincoln as the new community of license, the grant of a license to Citadel for the Albion station, and Citadel's operation of that new Albion station as a satellite of a separately-owned television station.

4. The Commission approved the proposal with the expectation that no competing applications would be filed for the newly-allocated television channel in Albion. In fact, however, a competing application was filed after Citadel had filed its application for the new Albion channel.

5. Under other circumstances, the Commission presumably could have and would have designated the two mutually exclusive applications for hearing and allowed modification of one of the applications to specify a new channel without loss of cut-off protection. However, in light of the pending freeze on the processing of mutually exclusive applications, the Commission could not pursue that course. To implement the original proposal, the Commission therefore decided to allocate yet

another television channel to Albion (Channel 24) "and permitted Citadel to modify its application from Channel 18 to Channel 24 without loss of cut-off protection." FCC 95-264 at ¶ 4 (emphasis added). In effect, the Commission approved a predesignation settlement under which a mutually exclusive applicant could amend its application to specify a new channel without being returned to the processing line -- despite a Commission rule that would otherwise require that latter result. See 47 C.F.R. § 73.3572(a)(1).

6. Although there are, to be sure, factual differences between SMCCD's application and the Citadel application, there is one overriding issue common to both applications: whether the Commission will preserve a mutually exclusive applicant's cut-off status (without return to the processing line) as part of an effort to resolve a conflict between two mutually exclusive applications. The Commission resolved that issue in the affirmative in Citadel Communications, Ltd. There is no reason to treat SMCCD's settlement agreement with Living Way Ministries any differently. The Commission should therefore take Citadel Communications, Ltd. into consideration in its disposition of the issue certified by the Presiding Judge.

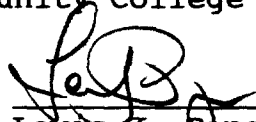
WHEREFORE, in view of the foregoing, it is respectfully requested that SMCCD's Motion for Leave to Supplement the Record be granted.

Respectfully submitted,

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By:


Lewis J. Paper

Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C. 20554

FCC 95-264

In re Applications of)	
)	
CITADEL COMMUNICATIONS)	
COMPANY, LTD.)	
)	
For Modification of Facilities to)	
Change the Community of License for)	File No. BPCT-930726KI
Television Station KCAN (Channel 8))	
from Albion to Lincoln, Nebraska)	
)	
For a Construction Permit for a New)	
Television Station on Channel 24)	File No. BPCT-930726KH
at Albion, Nebraska)	

MEMORANDUM OPINION AND ORDER

Adopted: June 26, 1995

Released: June 27, 1995

By the Commission: Commissioner Barrett concurring and issuing a statement.

1. The Commission has before it for consideration: 1) an application by Citadel Communications Company, Ltd. ("Citadel") to modify the facilities of television station KCAN-TV (ABC), Channel 8, Albion, Nebraska, to change its community of license to Lincoln, Nebraska; 2) an application by Citadel to construct a new commercial television station on Channel 24, Albion, Nebraska; 3) a petition to deny Citadel's construction permit application, filed by Busse Broadcasting Corporation ("Busse"), licensee of Station KOLN-TV (CBS), Lincoln, Nebraska; 4) informal objections to Citadel's modification application filed by Busse Broadcasting, and Pulitzer Broadcasting Company, licensee of Station KETV(TV) (ABC), Omaha, Nebraska; an informal objection to both applications filed by Pappas Telecasting of the Midlands, licensee of Station KPTM(TV) (Fox), Omaha, Nebraska; and 6) responsive pleadings.

2. Citadel proposes to operate the new Albion station as a satellite of KCAN as modified to operate at Lincoln, pursuant to the satellite exception to the duopoly rule contained in Note 5 of Section 73.3555 of the Commission's Rules.¹ Currently, Citadel operates Channel 8, Albion as a satellite of commonly-owned television Station KCAU (ABC), Channel 9, Sioux City, Iowa. Additionally, because

¹47 C.F.R. §73.3555.

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the predicted Grade B contour of the proposed Lincoln KCAN station overlaps with that of KCAU, and the predicted Grade B contour of Albion-24 overlaps with that of KCAU, the applicant seeks waivers of the Commission's duopoly rule to allow common ownership of all three stations. We shall first address the satellite proposal.

BACKGROUND

3. At the request of Citadel, licensee of KCAN, Channel 8 (ABC), Albion, Nebraska, the Commission issued a *Notice of Proposed Rulemaking*, 6 FCC Rcd 6038 (1991), proposing the substitution of UHF TV Channel 18 for VHF Channel 8 at Albion, the allotment of Channel 8 to Lincoln, Nebraska, and the modification of KCAN's license to change its community of license from Albion to Lincoln. Subsequently, in its *Report and Order*, 8 FCC Rcd 2876 (1993), the Commission granted this proposal on the condition that operation of station KCAN on Channel 8 in Lincoln would not commence until Citadel received a construction permit for Channel 18 (or an equivalent channel) at Albion, Nebraska, and had initiated equivalent ABC network service on that channel. In response to Citadel's submission of its application for Channel 18, Fant Broadcasting filed a mutually exclusive application on the A cut-off date. See File No. BPCT-931115KH.

4. Both Busse and Pappas Telecasting filed Petitions for Reconsideration directed to the *Report and Order*. On June 26, 1995, the Commission denied both petitions. *Amendment of Section 73.606(b), Table of Allotments, Television Broadcast Stations (Albion, Lincoln, and Columbus, Nebraska), Memorandum Opinion and Order* in MM Docket No. 91-304, FCC 95-266 (adopted June 26, 1995). In order to facilitate implementation of the *Report and Order* in the face of a competing application for Channel 18 in Albion, we also allotted Channel 24 to Albion and permitted Citadel to modify its application from Channel 18 to Channel 24 without loss of cut-off protection.² Accordingly, on March 23, 1995, Citadel modified its construction permit application to reflect this change.³

THE SATELLITE WAIVER REQUEST

5. *Background.* Prior to the issuance of the *Report and Order*, Citadel had

²*Amendment of Section 73.606(b), Table of Allotments, Television Broadcast Stations (Albion, Nebraska), Report and Order* in MM Docket No. 94-143, 10 FCC Rcd 3183 (1995).

³We note that Citadel's modification to Channel 24 does not result in any appreciable change in the contour overlaps between the Albion station and either KCAN, Lincoln or KCAU, Sioux City.

proposed to operate the Albion station as a satellite of KCAN, Lincoln. When the *Report and Order* conditioned the proposal on equivalent replacement ABC service to Albion, however, Citadel was not certain that KCAN, Lincoln would be permitted to operate as an ABC affiliate. Consequently, at the time Citadel submitted its application for Albion, it proposed to operate that station as a satellite of KCAU, Sioux City. On October 28, 1993, ABC agreed to award an ABC affiliation to the proposed KCAN, Lincoln station. For this reason, on November 9, 1993, Citadel amended its application to specify that the proposed Albion station would serve as a satellite of KCAN, Lincoln, rather than of KCAU.⁴

6. Pursuant to the Commission's satellite waiver policy, an applicant is entitled to a presumption that its proposed satellite operation is in the public interest if it meets three criteria: (1) no city-grade contour overlap exists between the parent and the satellite; (2) the proposed satellite would provide service to an underserved area; and (3) no alternative operator is ready and able to either construct or to purchase and operate the satellite as a full-service station. *Television Satellite Stations*, 6 FCC Rcd 4212, 4213-14 (1991) (petitions for partial stay and reconsideration pending). If the applicant cannot qualify for the presumption, we will evaluate the proposal on an *ad hoc* basis to determine whether other compelling circumstances warrant grant of the application. *Id.* at 4214. For the reasons set forth below, we find that the operation of Albion-24 as a satellite station is consistent with our policy.

7. With respect to the first criterion needed to qualify for the presumption, Citadel's engineering study demonstrates that no overlap exists between the City Grade contours of proposed stations KCAN, Lincoln and Albion-24. Thus, the

⁴In their pleadings, petitioners call attention to the fact that Citadel changed its proposal after the issuance of the *Report and Order*. This amendment, however, has no bearing on the Commission's satellite waiver decision. By requiring provision of equivalent replacement ABC service to Albion as a condition precedent to authorization for operation of the KCAN, Lincoln station, the Commission wanted to ensure that in granting Citadel's proposal an operating service would not be replaced with a vacant channel. *See Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License*, 5 FCC Rcd. 7094, 7097 (1990). Citadel's amended proposal, while changing the primary station, still ensures replacement service to Albion viewers. Moreover, using KCAN, Lincoln as the primary station provides additional public interest benefits not provided by using KCAU as the primary station. *See infra* ¶¶ 15, 24.

satellite proposal meets the first component of the presumption.⁵

8. Second, Citadel demonstrates that the area is underserved using the "transmission test." Under this test, the Commission considers a proposed satellite's community of license undeserved if that community has two or fewer full-service stations licensed to it. In this case, Citadel demonstrates that the proposed satellite station will provide service to an underserved area by showing that no full-service stations are licensed to Albion.⁶

9. Finally, to qualify for the presumption, an applicant must demonstrate that no alternative operator is ready and able to construct or to purchase and operate the proposed satellite as a full-service station. Applicants for a new station seeking satellite authorization can meet the presumption through economic showings, such as a history of television station failures in the market. *KMTR, Inc.*, 7 FCC Rcd 1025, 1025 (1992); *Television Satellite Stations*, 6 FCC Rcd at 4215. Here, the applicant notes the unlikelihood that Albion could support a full-service station. Indeed, for 27 of its 30 years of operation, the Albion station operated as a satellite. During the two years that it operated independently, the station lost approximately \$5,000,000, forcing its owners to sell it. In approving the application for assignment to Citadel, the Commission, noting the economic hardships incurred in trying to operate Channel 8, Albion as a full-service station, allowed it to operate as a satellite of KCAU pursuant to the satellite exception to the duopoly rules. *In re Application of Amaturo Group, Inc. and Citadel Communications, Ltd.*, 1 FCC Rcd 1020 (1986).

10. Fant's application to build and operate a full-service station on Channel 18 in Albion must be credited as sincere despite these historical market problems. Even accepting *arguendo*, however, that Fant will be able to realize its intentions, Citadel's contention that its station in Albion would not be able to operate as a full-service facility remains creditable. Presuming we grant Fant's application and it builds a full-service station in Albion, that station would draw upon the limited

⁵Several of the petitions were submitted prior to Citadel's amendment replacing KCAU with KCAN, Lincoln as the primary station for the Albion satellite. Since the satellite exception now applies to this overlap, arguments in these petitions based on a pure duopoly situation between the proposed KCAN, Lincoln and Albion 24 stations, are irrelevant and will therefore not be addressed. Of course, we still address the other contentions raised in these petitions, as well as those raised in the petitions submitted after Citadel filed its amendment.

⁶To meet this presumption, an applicant may also use the "reception test." Under this test, an underserved area is one in which 25% or more of the area within the satellite's Grade B contour receives four or fewer television services.

revenue base in the market and make it even less likely that Citadel's station could survive as a stand-alone full-service facility. See *KMTR, Inc.*, 7 FCC Rcd at 1026 (third element of satellite presumption test satisfied by an applicant even though a construction permit had been granted for a full-service station in the market).⁷

11. By satisfying all three criteria of the satellite presumption, Citadel has adequately demonstrated that operating Albion-24 as a satellite is in the public interest. In addition, none of the showings by the petitioners rebut the presumption, and we find no reason to rebut it on our own motion. In view of the foregoing, we find that satellite operation is justified. Next, we address Citadel's request for waivers of the duopoly rule.

DUOPOLY WAIVERS REQUEST

12. The Grade B contour of station KCAU, Sioux City, overlaps with the predicted Grade B contours of the proposed KCAN, Lincoln station, and of the proposed Albion station. Because Section 73.3555(b) of the Commission's Rules generally proscribes such overlap, Citadel requests waivers of the Rule. We shall first address the KCAU/KCAN overlap and then the KCAU/Albion-24 overlap.

13. *KCAU/KCAN*. Citadel argues that, pursuant to past Commission precedent, a waiver of the multiple ownership rules is appropriate in this instance since the public interest benefits gained from waiving the rule outweigh any detrimental effects resulting from the overlap. To support its request, Citadel notes several factors it believes weigh in favor of waiving the rule, including the size of the overlap, the level of diversity in the overlap area, the separateness of the markets, and various other public interest factors.

14. First, Citadel asserts that the amount of overlap is only slightly higher than the *de minimis* standard of less than one percent, and falls within the range of overlap approved by the Commission in the past. *Hubbard Broadcasting, Inc.*, 2 FCC Rcd 7374 (1987). According to Citadel, the predicted Grade B overlap, encompasses 1,271 square kilometers, representing 3.5% and 2.8% of the area within the new KCAN and KCAU Grade B contours, respectively, and 8,096 people, representing 1.27% and 1.31% of the populations within the Grade B contours of the new KCAN and KCAU Grade B contours, respectively.

⁷Because Fant has applied for a full-service station, we condition our grant of satellite authorization for Albion-24 on the requirement that Citadel maintain a local studio. See *KMTR, Inc.*, 7 FCC Rcd at 1026; *Meyer Broadcasting Co.*, 67 F.C.C.2d 593, 596 (1978), *aff'd sub nom.*, *Dickinson Broadcasting Corp. v. FCC*, 593 F.2d 1371 (D.C. Cir. 1979); *Midcontinent Broadcasting Co. of Wisconsin*, 12 F.C.C.2d 111, 114 (1968).

15. Second, Citadel notes the great variety of media voices available in both the Lincoln and Sioux City markets. Sioux City receives local television service from three stations, has seven radio stations licensed to it, and has a daily newspaper. Additionally, Lincoln has two local television stations, and thirteen radio stations licensed to it, as well as a daily newspaper.⁸ Citadel points out that in order to receive ABC service, Lincoln currently relies upon Pulitzer's KETV station, which is licensed to Omaha, Nebraska, nearly 70 miles from Lincoln, and which does not maintain a studio in Lincoln. Moreover, Citadel asserts, the only local commercial station to serve Lincoln is Busse's KOLN-TV (CBS) station. Consequently, Citadel argues that the addition of KCAN increases the level of diversity by providing Lincoln with a full-service ABC station and, in doing so, doubling the number of local commercial television stations licensed to Lincoln, the capital of Nebraska. As an added benefit of this proposal, Citadel notes that people within the overlap area will now receive programming from their state capital via KCAN rather than from an out-of-state station in Iowa.

16. Furthermore, Citadel claims that the two stations serve separate and distinct markets. Lincoln is in the Lincoln-Hastings-Kearney, Nebraska Area of Dominant Influence (ADI), while Sioux City is in the Sioux City, Iowa ADI. Citadel also points out other factors to demonstrate the distinctiveness of the two markets. It notes that Lincoln has a population of over 200,000 people, making it the nation's 81st largest city. In contrast Sioux City, Iowa, located over 120 miles from Lincoln, has a population of 80,000 people. While Lincoln plays an important role in the economic and political life of Nebraska, Sioux City serves as the center of an extensive agricultural and livestock area in Iowa.

17. Pulitzer disputes Citadel's assertion that the two stations will serve separate and distinct markets. It claims that Sioux City's close proximity to Nebraska, as well as the fact that KCAN, Albion-24, and KCAU will maintain affiliations with ABC, leads to the conclusion that the services will not operate autonomously with respect to programming, and that they will enjoy a competitive advantage relative to other services in the region. Therefore, they argue that the KCAU/KCAN overlap, combined with the KCAU/Albion-24 overlap, will provide Citadel with undue economic power. In response, Citadel maintains that Lincoln and Sioux City are each in their own trading center, and that there is no evidence

⁸The stations in Sioux City are: KTIV(TV) (NBC); KMEG(CBS); KSIN(TV); and radio stations KMNS(AM); KSCJ(AM); KWSL(AM); KWIT(FM); KGLI(FM); KSEZ(FM); KTFC(FM). The stations in Lincoln are: KOLN(TV) (CBS); KUON(TV) (PBS); and radio stations KEZG(FM); KFGE(FM); KFMQ(FM); KFRX(FM); KFOR(AM); KHAT(AM); KIBZ(AM); KLDZ(AM); KLIN(AM); KRNU(AM); KUCV(AM); KZUM(AM); KFMQ(AM). Citadel also notes that Lincoln receives some television service from KETV(ABC), KPTM(Fox), KMTV(CBS), and WOWT(NBC).

to show that advertisers or residents treat the area as a single market.

18. Finally, Citadel argues that grant of the modification would be in the public interest because it will transform a satellite that originates no local programming into a full-service station that will air news and other programming dealing with matters of specific concern to Lincoln and the surrounding area.

19. *KCAU/Albion-24*. As with the KCAN/KCAU overlap, Citadel asserts that the multiple ownership rules should be waived in this instance since the public interest benefits gained from waiving the rule outweigh the detrimental effects resulting from the overlap. First, according to Citadel the predicted Grade B overlap between KCAU and Albion-24 encompasses 1,148 square kilometers, representing 5.3% and 2.5% of the area within the Albion-24 and KCAU Grade B contours, respectively. Citadel maintains that these numbers fall within those that the Commission has approved in the past. In addition, Citadel notes that the overlap encompasses 31,651 people, representing 33.39% and 5.13% of the populations within the Grade B contours of Albion-24 and KCAU, respectively. Citadel maintains that the 33.39% figure is not significant for two reasons. It argues that, given the small number of people within the Albion-24 coverage area, any overlap that encompasses a population center skews the overlap percentage. Here the high percentage is due to the fact that the overlap area encompasses the town of Norfolk which has a population of 21,476 people. Second, Citadel asserts that in reality the overlap figures are lower since Norfolk does not receive a viewable signal from KCAU, and thus only receives an ABC signal through Channel 8, KCAN.

20. Petitioners dispute these arguments, claiming that it is precisely because the overlap area covers one of the most populous areas within the proposed Albion-24 Grade B contour, that the waiver should be denied. Furthermore, they contend that Citadel does not adequately explain why the fact that Norfolk may not receive a viewable signal dispenses with the issue of the overlap. Moreover, petitioners assert that Citadel specified underpowered facilities for Albion-24 in order to avoid an even larger overlap. In response to these assertions, Citadel reiterates its argument that although Norfolk will be in the overlap area, it will not receive a viewable signal from KCAU.

21. Next, Citadel maintains that common ownership of the two stations will not affect the level of diversity within the overlap area. According to the applicant, there is one television station, three television translator stations, four FM stations and one AM station licensed to the area.⁹ Besides these stations, at least one

⁹These stations are: KLNE(TV); KXNE(FM), KPNO(FM), KNEN(FM), KEXL(FM); WJAG(AM).

cable system serves each of the five counties within the area. In addition, Citadel notes that people within the Albion-24/KCAU overlap already receive two ABC signals, one from Channel 8, Albion and one from KCAU, Sioux City. Through Citadel's proposal, most of the residents presently in this overlap area will be outside of the Grade B contour for the new KCAN, Lincoln station. The majority of these people, however, will continue to receive ABC service from Albion-24, while some will receive service from KCAU, Iowa.

22. Citadel also notes that the overlap area consists of communities on the fringe of two separate and distinct markets. Albion, located within Boone County, has a population of approximately 1,900 people, is approximately 100 miles southwest of Sioux City, Iowa, and falls within the Lincoln-Hastings-Kearney ADI, not the Sioux City ADI. Madison County, the most populous area within the overlap, is in the Sioux City ADI. Citadel pledges to continue placing any advertising that comes from Madison County on KCAU, Sioux City.

23. In contrast, petitioners claim that Albion and Sioux City are in the same television market. In support of this contention, Busse notes that Sioux City is located on the border with Nebraska and that KCAU serves 158,000 television households in Iowa and 107,500 in Nebraska. Busse further notes that Channel 8, Albion, duplicates 100% of the programming of KCAU, and that it may be "assumed . . . that KCAU devotes a substantial portion of its news coverage to Nebraska." *Petition to Deny of Busse Broadcasting Company*, File No. BPCT-930726KH (Nov. 15, 1993), at 8. Based on these statements, Busse concludes that Sioux City and Albion are not in separate and distinct markets.

24. In addition to those mentioned above, Citadel asserts that several other factors weigh in favor of waiving the duopoly rule. It notes that grant of the proposal would result in individuals within the overlap area receiving local interest programming originating from Lincoln, their state capital, rather than from Sioux City, Iowa. Furthermore, Citadel pledges to integrate into KCAN's daily newscasts stories of specific concern to Albion-24 viewers.¹⁰ Petitioners claim, however, that Citadel's one paragraph program service statement does not make an adequate showing regarding the nature of the programming it proposes for Albion-24.

25. Citadel also stresses the large service gains, with few losses, that would result from implementation of its proposal. According to Citadel's engineering study, Albion-24 will provide a new service to a white area of 785 people within

¹⁰Citadel also submits letters from residents living in the overlap area, including one from the Mayor of Norfolk, which urges grant of the proposal and discusses the benefits of receiving programming from KCAN, Lincoln via the Albion-24 satellite.

223 square kilometers, and to a gray area of 8,861 people within 3,717 square kilometers. In response to petitioners' complaint that these numbers are lower than those predicted in the *Report and Order*, Citadel notes that these numbers still show that grant of the proposal will advance the public interest. It also notes that the proposal will result in loss of service to only 236 people, since all the rest of the people who would lose ABC service from Channel 8, Albion will receive ABC service from Albion-24, KCAN, Lincoln, KCAU, Sioux City, or KHGI, Kearney, Nebraska.

26. Finally, in support for its request of waiver of the duopoly rules for both overlaps, Citadel notes that grant of the proposal will reduce the overall level of overlap. Presently, the Channel 8, KCAN Albion overlap with KCAU encompasses a population of 82,003 people and 8,955 square kilometers. In contrast, the three overlaps that occur as a result of grant of this proposal encompass a total of 60,430 people and 6,539 square kilometers. Based on these numbers, Citadel concludes that granting the proposal will reduce the overall population overlap by 26.31% and the overall area overlap by 26.98%.

27. Additionally, Citadel maintains that the proposal will produce an overall reception service gain of 217,932 people and a service area increase of 17,048 square kilometers. This includes providing an overall first reception service to 785 people and a second television service to 9,864 people.

DUOPOLY WAIVERS DISCUSSION

28. The ultimate objective of the duopoly rule is to promote diversification of programming sources and viewpoints, and to prevent an undue concentration of economic power by fostering economic competition in broadcasting. *Multiple Ownership Rules*, 22 F.C.C. 2d 306, 307 (1970), *recon. granted in part*, 28 F.C.C. 2d 662 (1971). In adopting the duopoly rule's fixed standard of a prohibited overlap of Grade B service contours, the Commission sought to provide a greater degree of certainty than under its prior rule, which prohibited the common ownership of television stations serving "substantially the same service area." *Multiple Ownership of Standard, FM and Television Broadcast Stations*, 45 F.C.C. 1476, *recon. granted in part*, 3 R.R. 2d 1554 (1964). The Commission maintained a policy of "flexibility," however, noting that the rule could be waived in cases where its application would be "inappropriate." *Id.* at 1479 n.12. Accordingly, the Commission has granted waivers of the duopoly rule where the public interest benefits to be gained from waiving the rule would be greater than any detrimental effects resulting from the overlap. *Capital Cities Communications, Inc.*, 59 R.R. 2d 451, 465 (1985). We have considered several factors in making this public interest determination, including the extent of the overlap, the number of media voices in the overlap area, the distinctiveness of the respective markets, the concentration of economic power and other public interest factors. On the basis of

the showings before us in this case, we find that waiver of the duopoly rule for both overlaps would be consistent with both the public interest and our previous decisions.¹¹

29. *KCAU/KCAN*. Although not de minimis under our precedents, *see, e.g., Hubbard Broadcasting, Inc.*, 2 FCC Rcd 7374 (1987), the overlap between KCAU and KCAN falls within the Commission's decisions regarding the overlap permitted in duopoly situations. *See, e.g., Pegasus Broadcasting, Inc.*, 7 FCC Rcd 8625 (1992) (waiver granted where overlap constituted 7.6% and 3.9% of populations within stations' Grade B contours, and 7.7% and 6.9% of the areas within the stations' Grade B contours); *Taft Broadcasting Partners Limited Partnership*, 7 FCC Rcd 855 (1992) (11.4% and 4.3% of the populations, and 18% and 19.2% of the areas); *Silver King Broadcasting of Vineland, Inc.*, 2 FCC Rcd 324 (1986), *recon. denied sub nom.*, *Press Broadcasting Co.*, 3 FCC Rcd 6640 (1988), *aff'd sub nom., United Church of Christ v. FCC*, 911 F.2d 803 (D.C. Cir. 1990) (2.2% and 5.7% of the populations, and 10.4% and 9.8% of the areas); *Capital Cities Communications*, 59 R.R. 2d at 461 (24.7% and 12.4% of the populations, and 15.5% and 6.8% of the areas). Petitioners quite correctly point out that not all of the factors present in the duopoly waiver cases are present in this case. Contrary to their assertions, however, these differences do not lead us to the conclusion that these cases do not support a waiver in this instance. While the cases do vary on their facts, they all stand for the proposition that a waiver of the duopoly rule is warranted where the public interest benefits to be gained from waiving the rule outweigh the negative effects resulting from the overlap. Indeed, many of the public interest factors noted in other cases are present in this instance, as well as several other unique benefits that weigh in favor of granting the waiver.

30. Specifically, we believe that the number of voices available in the overlap area makes it unlikely that waiving the duopoly rule will result in the exercise by

¹¹Petitioners claim that because Albion-24 will operate as a satellite of KCAN, Lincoln, these stations are effectively one service. As such, they urge us to examine the combined overlap figures for the KCAU/KCAN and Albion-24/KCAU overlaps in making our determination regarding the duopoly waiver requests. We decline to do so. Duopoly waivers are granted on a case-by-case basis and the fact that one waiver involves a primary station and the other involves the satellite for that primary station, does not lead us to deviate from this policy. The factors involved with the KCAU/KCAN duopoly differ from those involved with the KCAU/Albion-24 duopoly, and should be examined separately. We do note that even if we did examine the duopolies together, the overlap between the combined Grade B contours of Albion-24 and KCAN-Lincoln with that of the combined Grade B contours of KCAU, still fall within the degree of overlap we have approved in the past.

Citadel of inordinate or dominant influence on public opinion.¹² Additionally, Citadel has stated that as a full service station KCAN, Lincoln will air news and other programming dealing with matters of direct concern to the residents of Lincoln and the surrounding areas. As a result, individuals in the overlap area will receive programming from their own state's capital, in addition to Sioux City programming, and people in Lincoln will receive their second local television service. Both results further the Commission's diversity objective. Moreover, the combined operation of channel 8 at Lincoln and the new Channel 24 at Albion will result in substantial service gains. *See infra* ¶36.

31. Despite petitioner's assertions to the contrary, we also find that KCAU and KCAN serve separate and distinct markets. The stations are located over 120 miles from each other, in different ADIs, and in demographically different cities which have individual service needs. Thus, common ownership of the stations will not result in an undue concentration of economic power. Moreover, by upgrading Channel 8 Albion from a satellite of Sioux City to a full-service station which will maintain its own studio within Lincoln, KCAN will be better equipped to meet the individual needs of the Nebraska communities which it serves.

32. *KCAU/Albion-24*. Although the area overlap between KCAU and Albion-24 falls within the Commission's recent decisions regarding the overlap permitted in a duopoly context, as does the percentage of population overlap for KCAU, *see, e.g., Pegasus Broadcasting, Inc.*, 7 FCC Rcd at 8625; *Taft Broadcasting Partners Limited Partnership*, 7 FCC Rcd at 855; *Capital Cities Communications*, 59 R.R. 2d at 461, the percentage of population overlap for Albion-24 is appreciably larger than in the typical duopoly waiver case. Nevertheless, we find that a waiver of the duopoly rule is warranted in this instance since the public interest benefits to be gained from waiving the rule outweigh the negative effects resulting from the overlap.

33. A large population overlap due to the existence of a population center within the overlap area, in the typical duopoly case, argues against rather than for grant of a duopoly waiver. This case, however, is far from typical. Although the overlap encompasses 31,651 people comprising 33.39% of the population within the proposed Albion-24 service area, over two-thirds of these people, or the entire 21,476 population of Norfolk, currently rely upon Channel 8, Albion to receive ABC service. By requiring construction of a station in Albion as a condition precedent to operation of the new KCAN, Lincoln station, we wanted to prevent disruption of ABC service to a large number of people. Clearly, disruption of ABC service to the town of Norfolk would run contrary to the policy goals we originally sought to

¹²Our staff analysis of the overlap area indicates that, in addition to the two stations at issue here, approximately seven television stations, two satellite stations, and thirty radio stations serve parts of the overlap area.

further by imposing this condition.¹³ It is evident, however, that because Norfolk lies on the fringe of KCAU's Grade B contour, without the KCAU/Albion-24 overlap some residents of that town may not receive a quality ABC signal. Thus, in this unique situation, the population overlap between KCAU and Albion-24 represents an unavoidable consequence of obtaining the service benefits inherent in the Albion to Lincoln move of Channel 8, while avoiding a loss of ABC service to a substantial number of viewers. Under these circumstances, we do not believe that waiver of the duopoly rule is precluded.

34. We also find that sufficient voices exist within the overlap area to make it unlikely that permitting the overlap will result in the exercise of an inordinate or dominant influence by Citadel on public opinion. Currently there is one television station, three television translator stations, four FM stations and one AM station actually licensed to communities within the overlap area and, in addition to KCAU and Albion-24, seven television stations, two television satellite stations and 30 radio stations provide service to parts of the overlap area. Further, at least one cable system serves each of the five counties within the area. Additionally, most of the population within the overlap area will receive only one quality ABC service, via Albion-24. Also, since this station will be a satellite for KCAN, Lincoln, the residents of this area will now receive programming from Nebraska, rather than from Iowa.

35. Furthermore, we find that KCAU and Albion-24 serve separate and distinct markets. See, e.g., *Capital Cities*, 59 R.R. 2d at 465; *WTAR Radio-TV Corp.*, 31 F.C.C.2d 812, *recon. denied*, FCC 70-1251, released December 7, 1970. The stations are located over 100 miles from each other, in different ADIs, and in demographically different cities with individual service needs. Busse's unsubstantiated assumption that KCAU devotes a substantial portion of its news coverage to Nebraska is irrelevant to our conclusion that these markets are distinct and that common ownership of the stations will thus not cause undue concentration of economic power.

36. Lastly, the combined operation of Albion-24 and channel 8 at Lincoln, will result in a substantial television service gain to the area. While more modest than the numbers projected in the *Report and Order*, the predicted 9,646 people who will receive either their first or second television service are significant public interest benefits. Also, granting both the construction permit and modification will result in a total service gain of 217,932, including a total of 10,649 people who will receive either their first or second television service. Moreover, the 236 people

¹³The applicant did indicate that it could redirectionalize its antenna in order to completely eliminate the KCAU/Albion-24 overlap. For the reasons noted above, however, we will not direct Citadel to take such a measure.

Citadel predicts will lose ABC service is a considerably smaller number than the 713 people predicted in our *Report and Order*.¹⁴ On the basis of the representations before us, we conclude that waiver of the duopoly rule for both overlaps would be consistent with the public interest.¹⁵

APPLICATION FOR MODIFICATION OF KCAN

37. To the extent that we addressed petitioners' arguments opposing the modification application in connection with our duopoly analysis above, we need not revisit these issues here. We will, however, briefly address three matters not previously discussed. First, we reject petitioners argument that, because viewers in the area may have VHF-only receiving antennas and therefore could not view the replacement Albion-24 station without purchasing UHF antennas, the loss of service to the Albion area may be larger than reflected in the numbers projected by Citadel. As Citadel notes, it has been almost thirty years since passage of the All-Channel Receiver Act, under which we required that all televisions with VHF antennas also have UHF antennas. *In re Television Broadcast Receiver Antennas*, 62 F.C.C.2d 164 (1976); 47 C.F.R. §15.117(e). Consequently, almost all televisions already have both VHF and UHF capabilities. Furthermore, as Citadel states, Albion already receives most of its television service through UHF stations. Thus, we find it unlikely that a significant number of people who desire to receive UHF station Albion-24 will not have the antenna necessary to do so.

38. We also reject petitioners' assertion that the modification cannot be granted because Citadel cannot meet the condition precedent to the grant, namely, provision of an equivalent ABC network service. Although the letter granting an ABC affiliation places a December 31, 1994 deadline on the agreement, Citadel notes that it does not contemplate any difficulty in extending this affiliation agreement. Indeed, counsel for Citadel submitted to the Commission a letter dated

¹⁴Busse claims that grant of the proposal will result in a loss of service to 52.13% of the area and 82.71% of the population (453,423 people) presently served by Channel 8, Albion. This argument is disingenuous at best, since in the same petition Busse argues against grant of the Albion-24 construction permit, thereby acknowledging Citadel's intentions to provide replacement service for the Channel 8, Albion station.

¹⁵Petitioners also claimed that Citadel specified underpowered facilities for Albion-24 in order to reduce the overlap. Our engineers agree with Citadel's showing that the proposed facilities are almost identical to those the Commission approved in the *Report and Order*, and are within the range allowed by our Rules. Thus, petitioners' claim does not provide a reason to deny the waiver.

January 17, 1995 noting that ABC has extended its affiliation commitment for both KCAN and Albion-24 for a six month period. Moreover, petitioners have provided no factual basis to substantiate their belief that Citadel may not honor its pledge to supply ABC replacement service to the areas affected by the relocation. In the absence of any factual allegations to the contrary, we will assume that Citadel will abide by its representations. See *News International, PLC*, 97 F.C.C.2d 349, 356 (1984).¹⁶ Further, we note that, as per our *Report and Order*, the Lincoln facility cannot be constructed before the Albion facility is operational and has initiated ABC service.

CONCLUSION

39. In conclusion, we find that the applicant is fully qualified to operate as proposed. Further, we find that grant of this application will serve the public interest, convenience and necessity.

40. Accordingly, IT IS ORDERED, That the petitions to deny the application of

¹⁶ In addition, petitioners had argued that due to the *Bechtel* freeze on the comparative hearing process, the Commission would not be able to choose a permittee for the Albion station in the face of the competing applications for Channel 18. *Bechtel v. FCC*, 10 F.3d 875 (D.C. Cir. 1993). Because we have allotted two channels in Albion, and Citadel has amended its application to Channel 24, however, this is no longer an issue.

Also, we reject petitioners' suggestions that our holding in the *Anniston* case precludes us from granting this modification. Even if an FM radio station allotment proceeding applied here, in that case the staff denied a proposal to reallocate an FM station to another city because, *inter alia*, the move would have caused disruption in service to 410,000 people. See *Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Eatonton and Sandy Springs, Georgia, and Anniston and Lineville, Alabama)*, 6 FCC Rcd 6580 (1991), *app. for rev. pending*. As noted above, grant of this proposal will not result in such a service disruption.

Finally, Busse had claimed that we should reject Citadel's application because, at the time Citadel filed the application, the Federal Aviation Administration had not given final approval to the KCAN, Lincoln transmitter site. Citadel disputed that claim, noting that its air space consultant strongly disagreed with Busse's with respect to the air hazard issue. On March 23, 1994, the Federal Aviation Administration issued a final Determination of No Hazard to Air Navigation (#93-ACE-0467-OE) in favor of Citadel's proposal. This determination was appealed (OE Docket No. 94-AWA-OE-12) and reversed on March 30, 1995. Subsequently, the FAA granted Citadel's petition for reconsideration of that reversal and, on April 26, 1995, issued a final Determination of No Hazard, thus rendering the issue raised by Busse moot.

Citadel Communications Company, Ltd. for a modification permit and for a construction permit, filed by Busse Broadcasting Corporation, Pappas Telecasting of the Midlands, and Pulitzer Broadcasting Company, ARE GRANTED to the extent indicated herein and ARE DENIED in all other respects.

41. IT IS FURTHER ORDERED, That the request by Citadel for operation of station Albion-24, Albion, Nebraska pursuant to the satellite exception to the duopoly rule, Section 73.3555(a)(3) of the Commission's Rules, IS GRANTED.

42. IT IS FURTHER ORDERED, That the request for waiver of the duopoly rule, Section 73.3555(b), to permit common ownership of television stations KCAU, KCAN and Albion-24, IS GRANTED.

43. IT IS FURTHER ORDERED, That the application for the construction permit for a new television station on Channel 24 at Albion, Nebraska, IS GRANTED.

44. IT IS FURTHER ORDERED, That the application for for modification of facilities to change the community of license for television station KCAN, Channel 8, from Albion to Lincoln, Nebraska, IS GRANTED subject to the condition that the Lincoln facility is not constructed before the Albion facility is operational and has commenced ABC Network service.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

CONCURRING STATEMENT

OF

COMMISSIONER ANDREW C. BARRETT

RE: In re Application of KCAN-TV, Channel 8 for Modification of Facilities to Change the Community of License from Albion to Lincoln, Nebraska, and Application for a Construction Permit for a New Television Station on Channel 24 at Albion, Nebraska (Memorandum Opinion and Order) (File No. BPCT-930726KI) (File No. BPCT-930726KH)

In this Memorandum Opinion and Order, the Commission grants Citadel Communications Company, Ltd. ("Citadel"), permission to modify the facilities of station KCAN (Channel 8) in order to change the community of license from Albion to Lincoln, Nebraska. The Commission also grants Citadel a construction permit for a new television station on Channel 24 at Albion, Nebraska. While I support the modification, change of community of license, and channel allotment, I am reluctant to endorse yet another waiver of the Commission's duopoly rule. As such, I concur in this decision.

As I have stated on numerous occasions, my concern stems from the repeated modification of the Commission's rules through the waiver process.¹ I now find it necessary to reiterate my concern. In this proceeding Citadel requests a waiver of the Commission's duopoly rule, 47 C.F.R. section 73.3555(b). The duopoly rule exists to promote maximum diversification of program and service viewpoints and to prevent an undue concentration of economic power contrary to the public interest.² Notwithstanding the Commission's finding that waiver of the duopoly rule, for two overlaps in this proceeding, would be consistent with both the public interest and previous precedent, it is my opinion that the Commission's actions serve only to circumvent our established ownership regulations by way of a waiver. My concurrence today is based on several factors: (i) the residents of Lincoln will now receive programming from Nebraska, rather than Iowa, (ii) a greater number of residents will receive service from the ABC affiliate station, and (iii) a variety of media voices are available in the overlap area. Nevertheless, I concur in today's decision, notwithstanding my continued misgivings about allowing the waiver process to effectively modify our local ownership rules.

¹See Pegasus Broadcasting, 7 FCC Rcd 8625 (1992) (Dissenting Statement of Commissioner Andrew C. Barrett). See also In re: ACT III Broadcasting of Buffalo, 8 FCC Rcd 885 (1993) (Dissenting Statement of Commissioner Andrew C. Barrett); Sunshine Television, Inc., 8 FCC Rcd 4428 (1993) (Statement of

Commissioner Andrew C. Barrett - Concurring in Part); H&C Communications, Inc., 73 RR 2d 1108 (1993) (Concurring Statement of Andrew C. Barrett); In re Application of Salt of the Earth Broadcasting, Ltd., 9 FCC Rcd 3621 (1994) (Concurring Statement of Commissioner Andrew C. Barrett); In re Application of Sam Jones, Jr., FCC Rcd (1995) (Concurring Statement of Commissioner Andrew C. Barrett).

²See Multiple Ownership Rules, 22 FCC 2d 306,307 (1970), recon. granted in part, 28 FCC 2d 662 (1971).

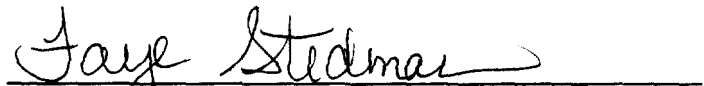
CERTIFICATE OF SERVICE

I, Faye Stedman, hereby certify that on this 25th day of October, 1995, a copy of the foregoing was sent via hand delivery, where indicated, or via first class mail, postage prepaid, to the following:

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